UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY,	)	
	)	
Employer,	)	
	)	
and	)	Case 13-RC-121359
	)	
COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA),	)	
	)	
Petitioner.	)	

NORTHWESTERN UNIVERSITY'S REPLY BRIEF TO THE BOARD ON REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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I. INTRODUCTION

The decision in Brown University, 342 NLRB 483 (2004), represents the Board's most recent, and governing, analysis of whether students engaged in activities at the colleges and universities in which they are enrolled are employees under the Act. The Regional Director refused to follow Brown, deeming it inapplicable based entirely on his assertion that the Northwestern student-athletes' "football-related duties are unrelated to their academic studies unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements." (DDE 18)[1] CAPA, recognizing the weakness of its prior argument that Brown should be reversed, parrots the Regional Director's conclusion, and endorses his decision to apply the common law master-servant test instead of Brown.[2]

The Regional Director and CAPA are both wrong in their reliance on the master-servant test, and their error highlights the reason the Board has long recognized that labor law principles cannot be mechanically applied in an educational setting. The Regional Director's conclusion rests on his personal assessment of a university's educational mission, one that is inconsistent with the abundant record of Northwestern's own articulation of, and historical practice regarding, its mission. In the Regional Director's limited view, education is only what is imparted by academic faculty in a classroom or laboratory and only to the extent that those activities result in academic credit or are necessary to obtain a degree in a particular discipline. His approach allows no room for a university to decide, as Northwestern and many other schools have, that the

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[1] For ease of reference, Northwestern will cite to its Brief to the Regional Director as "NU Br. to RD," its Request for Review as "NU RFR" and its Opening Brief to the Board as "NU Br."; similarly, Northwestern will cite to CAPA's Brief to the Regional Director as "CAPA Br. to RD," CAPA's Opposition to Northwestern's Request for Review as "CAPA Opp. To RFR" and CAPA's Opening Brief to the Board as "CAPA Br."

[2] CAPA did not respond to Northwestern's arguments that the Regional Director erroneously placed the burden of disproving "employee" status on Northwestern (NU Br. 13), scholarship student-athletes are temporary employees and should be excluded from collective bargaining (NU Br. 47), the unit is inappropriate for bargaining (NU Br. 48), and CAPA is not a labor organization within the meaning of the Act. (NU Br. 50) Therefore, without waiving those arguments, Northwestern will not repeat them in this Brief.

education of young adults, particularly in a residential college environment, entails much more than studying academic subjects, taking tests, receiving grades, and logging credit hours. It is precisely because professional educators must be free to decide how best to educate their charges that the Supreme Court, other federal courts, and the Board itself have long emphasized that educational judgments cannot be second-guessed by the government, and that rules and principles designed for an inherently adversarial industrial environment cannot be transplanted into the inherently cooperative environment of higher education. Brown cannot be avoided by pretending a Northwestern education is something less than what the record shows it has been for decades.

That Brown is and should remain good law is underscored by the *amicus* filings.[3] The majority of *amici* that support Northwestern provide compelling reasons why Brown should not be overruled. These *amici* also explain why the common law master-servant test cannot be used to determine whether Northwestern's scholarship football student-athletes are employees within the meaning of the Act, why they are not employees under that test in any event, and why a finding of employee status would conflict with the purposes of the Act and with public policy. In addition, the *amici* present extensive authorities under other federal and state statutes, including Title IX and Title VII, supporting the conclusion that scholarship football student-athletes are not employees within the meaning of the Act. Finally, the *amici* address the extent to which the Board should consider the existence of outside constraints in deciding this case.[4]

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[3] In addition to the briefs submitted by Northwestern and CAPA, 24 *amicus* briefs were submitted by universities, associations, and individuals in response to the Board's Notice and Invitation to File Briefs. Briefs submitted by the *amici* are cited as "[Submitting Party's Name] Br." followed by the page number.

[4] *Amici* Association for the Protection of Collegiate Athletes ("APCA"), Baylor University, *et al.*, Higher Education Council of the Employment Law Alliance ("ELA"), Brown University, *et al.*, Leech Tishman Fuscaldo & Lampl, LLC ("Leech Tishman"), National Collegiate Athletic Association ("NCAA"), and the United States Senate Committee on Health Education Labor and Pensions and the United States House of Representatives Committee on Education and the Workforce ("Senate and House Committees") urge the Board to apply the Brown test in determining whether Northwestern's scholarship football student-athletes are employees within the meaning of the Act, while the National Association of Collegiate Directors of Athletics and Division 1A Athletic Directors' Association ("NACDA") and The University of Notre Dame, *et al.* argue that the Regional Director misapplied the common law test for determining employee status. American Council on Education and other Higher Education

In contrast, only a few of CAPA's *amici* address the issues identified by the Board, including whether Brown should be overruled, whether it should apply in this case, and whether other statutes, including Title VII and Title IX, are relevant. Instead, CAPA's *amici* rely extensively on materials from other lawsuits and other matters that are not part of the record here.[5] Obviously, the Board's decision here must be based on the facts and evidence presented in this case. While it is not unusual for *amici*, to a limited extent, to base arguments on matters that pertain to their unique interests and that are not part of the record, in this case several *amici* have far exceeded any reasonable limits.[6] Therefore, Northwestern respectfully urges the Board to exercise caution when considering the arguments advanced by *amici* based on factual assertions that are not part of the record in this case.

II. ARGUMENT

A. THE BOARD SHOULD NOT OVERRULE BROWN UNIVERSITY

A review of the parties' and *amicus* briefs reflects that there is little support for overruling Brown. Even CAPA has modified its position as the case has progressed. In its original brief to

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Associations ("ACE"), APCA, Baylor, ELA, J. Aloysius Hogan, Esq., Brown, Leech Tishman, NACDA, NCAA, Notre Dame, and the Senate and House Committees all argue that the Board should not overrule Brown. All of the *amici* supporting Northwestern with the exception of Brown, identify and discuss statutory and public policy reasons why Northwestern's football student-athletes should not be allowed to unionize. ACE, The Big Ten Conference, Inc., Baylor, NACDA, NCAA, Notre Dame, and the Senate and House Committees address the relevance of determinations under other statutes and regulations. ACE, Big Ten, Baylor, Hogan, NACDA, NCAA, and the Senate and House Committees discuss Title VII and Title IX ramifications.

[5] For example, the *amicus* brief from a group of 18 labor law professors and "scholars" does not contain a single citation to the record, relies on overruled authorities, misconstrues the common law test for determining employee status under the Act, and also relies on a variety of articles, publications and blogs, which are not part of the record, to support its dubious conclusions. This *amicus* brief also takes issue with the term "student-athlete" and its origins, and then coins its own term, "Scholarship Athlete-Employees," as if labels will decide this case. (Labor Law Professors Br. 27-28) Labels, of course, do not determine employee status under the Act. See, e.g., Harris v. Quinn, 134 S. Ct. 2618 (2014) (labels are not determinative); Seattle Opera Ass'n, 331 NLRB 1072 (2000), enf'd, 292 F.3d 757 (D.C. Cir. 2002) ("auxiliary" choristers were employees). Moreover, although "student-athlete" accurately describes the Northwestern football players who receive athletic scholarships, Northwestern has never claimed that this label is relevant in determining whether they are employees under Act.

[6] For example, *amicus* Hausfeld relies extensively on trial testimony in an antitrust lawsuit against the NCAA that has yet to be weighed by a factfinder. (Hausfeld Br. 4, 8-10, 13) The Sports Economists present statistical analysis of scores of universities' revenue, tuition, attendance and television contracts (Sports Economists Br. 4-5), while the Players' Associations reference numerous clauses and provisions of professional sports leagues' collective bargaining agreements. (Players' Associations Br. 13-25)

the Regional Director, and in its Opposition to Northwestern's Request for Review, CAPA argued that Brown should be overruled and that NYU I was correctly decided. (CAPA Br. to RD 27, n.13; CAPA Opp. to RFR 21-24) In its brief to the Board, CAPA no longer urges the Board to overrule Brown; rather, it argues, incorrectly, that Brown does not apply to the facts of this case. (CAPA Br. 31-33) In fact, only *amici* Kulwiec, Hoerger, and the AAUP argue that the Board should overrule Brown. (Kulwiec Br. 12-17; Hoerger Br. 4-7; AAUP Br. 3-6) For the reasons stated in Northwestern's brief (NU Br. 14-30), and the compelling arguments set forth at length in the *amicus* brief submitted by Brown University, there is no justification for the Board to overrule Brown. That decision not only takes into account appropriate public policy considerations, but also recognizes the fundamental difference between academic and economic relationships in determining whether students who perform "services" at the institution in which they are enrolled are employees within the meaning of the Act. Brown should remain the controlling authority and the analytical framework for determining whether Northwestern's scholarship football student-athletes are employees under Section 2(3) of the Act.

B. BROWN UNIVERSITY PROVIDES THE APPROPRIATE FRAMEWORK AND COMPELS A FINDING THAT THE SCHOLARSHIP FOOTBALL STUDENT-ATHLETES ARE STUDENTS

1. Participation In Intercollegiate Athletics Is An Integral Component Of Northwestern's Educational Mission

The key basis for the Regional Director's conclusion that Brown does not control this case - namely, that the football-related "duties" of Northwestern's scholarship football student-athletes are unrelated to their educations (CAPA Br. 7; DDE 19) - is wrong. In its brief, CAPA presses this erroneous argument, even to the point of trivializing Northwestern's mission statement by comparing the lessons learned in intercollegiate athletics to those learned working on the University's grounds crew. (CAPA Br. 36) CAPA's position is not only ill-conceived, but it highlights the precise danger that arises when a statute designed for purely economic and

commercial relationships is imposed on an educational setting. It is not the role of CAPA, or the Board, to determine or second guess what activities form part of a university education or what aspects of that education are components of the university's academic mission. As the Supreme Court has cautioned, and Baylor points out in its *amicus* brief (Baylor Br. 5), a university has the fundamental right "to determine for itself on academic grounds, who may teach, what may be taught, how it shall be taught and who may be admitted to study...." Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957).

There is overwhelming evidence that intercollegiate athletics are an integral aspect of the educational mission of Northwestern and other private and public universities. (Baylor Br. 2-5) As *amicus* ELA aptly states, "[e]ducation [at a college or university] is a far more expansive concept... [that] encompasses not only academic activities but also extracurricular and other activities engaged in by virtue of a student's enrollment there." (ELA Br. 5) The view that universities provide education through activities that are not directly connected to degree requirements is so widespread that Congress itself, in enacting Title IX, expressly recognized that "education" includes extracurricular programs including, in particular, intercollegiate athletics. 34 C.F.R. §§ 106.31(a); 106.41(a). (ACE Br. 20-22; NCAA Br. 8-9; Senate and House Committees Br. 3-4) Accordingly, the linchpin for the Regional Director's conclusion that Brown does not apply in this case – namely, that "football duties" of Northwestern's student-athletes are unrelated to the University's educational mission – is simply incorrect.

2. *CAPA Acknowledges That Hours Devoted To Football Are Irrelevant And That The Purpose Of The Act Is Relevant*

CAPA and the Regional Director detail the hours Northwestern's scholarship football student-athletes devote to football-related activities at different times of the year. But CAPA acknowledges that the amount of time students devote to academics or to "work," and the

subjective value they place on one versus the other, are irrelevant in deciding whether a particular category of students are employees under the Act. Instead, CAPA says, what matters is "whether collective bargaining would effectuate the purposes of the Act." (CAPA Br. 34) By that measure, the Regional Director's decision is fatally flawed because he completely fails to address the statutory and policy considerations implicated by his finding that Northwestern's scholarship football student-athletes are employees within the meaning of the Act.

3. CAPA Mischaracterizes St. Clare's Hospital and Health Center

CAPA acknowledges that in St. Clare's Hospital and Health Center, "the Board undertook to explain more fully the approach to be followed in 'cases...in which students perform services at their educational institutions which are *directly related* to their educational program.'" 229 NLRB 1000, 1002 (1977). In such cases, CAPA argues, the Board's *sole* rationale for dismissing an election petition is that since the individuals are rendering services that "are directly related to- and indeed constitute an integral part of-their educational program, they are serving primarily as students and not primarily as employees." (CAPA Br. 26, quoting St. Clare's, 229 NLRB at 1002) CAPA ignores, however, that the Board in St. Clare's also explained its rationale for determining whether students in four categories were employees within the meaning of the Act.[7] Those categories are (1) students employed by a commercial employer in a capacity unrelated to the student's course of study; (2) students employed by their own educational institutions in a capacity unrelated to their course of study; (3) students employed by a commercial employer in a capacity that is related to the students' course of study; and (4) students who perform services at their educational institutions that are directly related to their educational program.

[7] CAPA accuses Northwestern of relying on decisions, "some overruled and others of dubious precedential value," to support its argument that the Board has found certain categories of individuals to be "primarily students" of the institution that "employs" them. (CAPA Br. 24) However, CAPA does not offer a single example to support that accusation and even acknowledges that certain principles espoused in St. Clare's remain good law.

Here, the first and third categories clearly do not apply. Moreover, even if scholarship football student-athletes are deemed to be employees by the Board, they squarely fit into the fourth category identified in St. Clare's because their participation in the University's football program is an integral part of their education and helps prepare them for whatever vocations they may seek to pursue after they graduate. In any event, even accepting CAPA's argument at face value, if the Board finds that Northwestern's scholarship football student-athletes fall into the second category identified in St. Clare's and concludes that the student-athletes' participation in Northwestern's football program is unrelated to their education, they nonetheless should not be allowed to pursue representation under the Act because, as the Board explained, "in these situations employment is merely incidental to the students' primary interest of acquiring an education, ..." St. Clare's, 229 NLRB at 1001, citing San Francisco Art Institute, 226 NLRB 1251 (1976).

C. THE REGIONAL DIRECTOR'S CONTENTION THAT NORTHWESTERN'S FOOTBALL PROGRAM IS A COMMERCIAL ENTERPRISE IS BOTH LEGALLY IRRELEVANT AND FACTUALLY WRONG

To support its argument that Northwestern and its scholarship football student-athletes are engaged in an economic relationship, CAPA asserts that Northwestern's football program is a commercial enterprise that generates significant revenue and profits. (CAPA Br. 7) The Regional Director adopted that argument to support his conclusion that scholarship football student-athletes perform a service that benefits the University financially, in return for which, in his view, the players receive compensation in the form of athletic scholarships. (DDE 14)

This approach has two fatal flaws, one legal and one factual. As a legal matter, there is no support for the proposition that the amount of revenue or profit generated by a particular activity has any bearing on whether individuals engaged in that activity are employees under the Act. Such a test would, absurdly, hinge employee status on the financial success or failure of the

venture. A cook at a failing restaurant is an employee just as much as a cook at a successful one. Likewise, a scholarship student-athlete in a sport that generates no net revenue for a university is just as much a student and not an employee as a scholarship student-athlete in a revenue-generating sport. This is because all scholarship student-athletes perform the same "services" for their universities and receive the same "compensation" from their universities. So there is no principled way to conclude that men's football and basketball scholarship student-athletes are employees while those in all other sports are not. CAPA seeks to conceal the absurdity by proposing to represent only students in men's football and basketball. But the (il)logic of its position is what matters, not its interest in representing only higher profile student-athletes.[8]

As a factual matter, the propositions that Northwestern's football program is a separate, profitable commercial activity, and that private colleges and universities offer intercollegiate sports programs for a revenue-generating purpose, cannot be supported. As pointed out by *amici* ACE, the notion that colleges and universities offer athletic opportunities to generate revenue is demonstrably false.[9] The Northwestern athletics program consistently has a significant revenue shortfall, and Northwestern subsidizes its Athletic Department to make up the deficit. (Tr. 652-653) In the 2012-2013 year, for example, that subsidy was $12.7 million. (Tr. 676-677; Em. Ex. 11) Northwestern does so because it has a commitment to offer a world-class educational

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[8] CAPA drafted its Founding Statement to be consistent with this argument, limiting its membership to "scholarship athletes who participate in the Football Bowl Subdivision [of the NCAA] and Division I men's basketball." (Jt. Ex.1) Using this standard would mean, as a practical matter, that it would affect only the very small percentage of scholarship student-athletes who compete in Division I revenue-producing sports (football and basketball) and who attend private colleges and universities.

[9] The purported "empirical" evidence on revenues and the profitability of FBS Division I athletic programs proffered by *amicus* Sports Economists is completely irrelevant to the issues in this case. This *amicus* simply creates a straw man by asserting that an unidentified group ("some") have suggested the claimed poverty of NCAA FBS football programs should be regarded as a constraint on affording scholarship football players at private universities the right to engage in collective bargaining. (Sports Economists Br. 3) However, Northwestern has never advanced that argument nor have other *amici* supporting its position. In short, whether FBS football programs in general or at private universities do or do not generate positive revenue has no relevance whatsoever to the issues in this case, and this *amicus* brief appears to be offered solely for the emotional appeal of the perceived unfairness or imbalance between the benefits of an athletic scholarship compared to the revenues generated by FBS colleges and universities that sponsor intercollegiate football programs.

experience, which includes a varsity athletic program in addition to premier academics. (Tr. 677) Contrary to the assertion in the Sports Economists' *amicus* brief, intercollegiate sports are far from a cash cow; indeed, only a small fraction of athletics programs at a small fraction of schools generate positive net revenue. (ACE Br. 7, citing Restoring the Balance: Dollars, Values, and the Future of College Sports (2010), available at http://www.knightcommission.org/restoringthebalance)

The fact that the vast majority of collegiate athletics programs must be subsidized by funds from other university sources refutes the notion that colleges and universities offer these programs for their commercial benefit or that the relationship between the institution and scholarship recipients can be characterized as an economic one.[10] Northwestern is not in the "business" of football; the "business" of the University is education, and football and other intercollegiate athletic programs are an integral component of the educational process.

D. UNDER THE COMMON LAW TEST, THERE CAN BE NO FINDING OF EMPLOYEE STATUS

While there is no reason to depart from the Board's use of the "predominantly educational" test in the higher education setting,[11] neither CAPA nor its supporting *amici* have demonstrated that football scholarship student-athletes meet the definition of employees even under the common law test.

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[10] Not only does the evidence refute the proposition that Northwestern views football as a business, Title IX prevents Northwestern from running its program with a view simply to the profit to be generated from a "business." Even if providing a men's scholarship football program alone would make Northwestern's intercollegiate athletics profitable, Title IX prohibits offering athletic scholarships only to men. To comply with Title IX, Northwestern must offer scholarship opportunities to women athletes as well. Under Title IX, a school's athletics program is viewed as a whole, and so treating football as separate from the rest of the program cannot be reconciled with federal law.

[11] In fact, even one of the *amicus* briefs which supports CAPA's position recognized the Board's flexibility in using a test other than the common law agency test to determine employee status under Section 2(3) of the Act, particularly in the educational setting. (Labor Law Professors Br. 4-5)

1. The Tender Of Financial Aid Is Not A Contract For Hire Or A "Compensation Package"

The Regional Director held that "under the common law definition, an employee is a person who performs services for another *under a contract of hire*, subject to the other's control or right of control, and in return for payment." (DDE 13 (emphasis added), citing Brown, 342 NLRB at 490, n.27, in turn citing NLRB v. Town & Country Electric, 516 U.S. 85, 94 (1995)) In its Opposition to Northwestern's Request for Review, CAPA agreed that a contract of hire is a required element of the common law test. (CAPA Opp. to RFR 17) However, in its brief to the Board, CAPA challenges the Regional Director's finding that a contract of hire is required, arguing that he incorrectly cited the concurring opinion in Brown for this proposition. (CAPA Br. 9, n.3)[12] Contrary to CAPA's about-face, the Regional Director was correct in citing Brown and Town & Country Electric, where the Supreme Court adopted the Black's Law Dictionary definition of an "employee" as "person in the service of another under any *contract of hire*, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed." 516 U.S. at 90 (emphasis added).

Nevertheless, both the Regional Director and CAPA are wrong in asserting that the athletic scholarship Tender offer is a contract of hire or a "compensation package." (Notre Dame Br. 5-16; ACE Br. 15; Baylor Br. 6-7) Rather, the Tender is plainly an offer of financial aid, granted to football student-athletes to defray the costs associated with obtaining a first-rate education. There is not a single reference to "employment," "services," "hire," "pay" or "labor" in the Tender. On the contrary, the Tender is contingent upon admission to Northwestern, and

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[12] CAPA's reliance on Hubbard v. Henry, 231 S.W.3d 124 (Ky. 2007) is misplaced. (CAPA Br. 9, n.3) In that case, there was no dispute about the parties' intent to enter into an employment relationship. Here, there is no evidence that Northwestern or any student-athlete in the petitioned-for unit ever intended to enter into any sort of employment relationship.

requires that the student-athlete remain in good academic standing. (Jt. Ex. 27; Em. Ex. 5; Tr. 771-72, 786-87) It is no different in purpose from the tenders of aid offered to any student receiving financial aid at Northwestern. (Em. Exs. 14-15)

Nor have CAPA or its *amici* identified any evidence in the record to show that Northwestern and the football student-athletes who receive athletic scholarships ever intended to enter into an employment relationship. See WBAI Pacifica Foundation, 328 NLRB 1273, 1275 (1999) (analyzing intent of the parties in concluding that volunteers at a radio station were not employees); (Notre Dame Br. 7-10, citing multiple cases explaining that intent of the parties must be analyzed when there is a question whether a "for hire" employment relationship exists) Beginning with the recruiting process, continuing through the admissions process and right through graduation, Northwestern never wavers from its message to the student-athletes that it desires to admit only student-athletes who can succeed academically, and that it is committed to ensure that success through academic support, career readiness and social preparation.[13] No better evidence of that commitment – or the educational purpose of the relationship – exists than Northwestern's 97 percent graduation rate for its football student-athletes. In short, the record makes clear that Northwestern and the scholarship football student-athletes mutually understand that the student-athletes will attend school and play amateur, intercollegiate football. The element of a mutual intent to create an employer-employee relationship required at common law is missing.

Likewise, there is no evidence or law supporting the argument made by CAPA and certain *amici* that the Tender is a "compensation package" awarded to the scholarship football student-

[13] Indeed, all of the record evidence presented by Northwestern, including the written communications to student-athletes, the testimony of Northwestern officials and former student-athletes, and even the testimony of Colter, confirms that at the time individuals were recruited and offered a scholarship, the mutual intent was to admit a student and enter into an educational relationship. (Tr. 805-811, 815, 1023-1024, 1033-1034, 1220, 1233, 1262-1263, 1306; Jt. Ex. 16 at NU 14-15; Jt. Ex. 17 at NU 186-194; Em. Exs. 28-30)

athletes in exchange for their services. (CAPA Br. 18-21; AFL-CIO Br. 2-3, 6) The Tender explicitly provides that the aid will not be reduced or canceled "[o]n the basis of ... athletics ability, performance or contribution to the team's success; [b]ecause of an injury, illness or physical or mental condition ... or for any other athletics reason."[14] (Jt. Ex. 27; Em. Ex. 5) The amount of financial aid is not dependent upon either athletic talent (merit) or effort (time spent), but rather is determined by the cost of tuition, food, housing and books. It is not compensation that students can spend as they see fit – its sole purpose is to pay for education and its attendant costs. The athletic scholarship aid is administered through the financial aid office, applied directly to a student's tuition account, and is not processed through payroll or subject to withholdings, and has never been treated as wages by the University, the student-athlete, or the Internal Revenue Service.[15]

Moreover, every scholarship student-athlete at Northwestern – not just football players – signs a Tender offer, which details the conditions for continued aid. (Em. Ex. 5 at NU 969) Apart from the fact that scholarship funds are not taxed or otherwise treated like wages in any way by the University, the student-athlete, or the government, it would be wholly arbitrary to single out football players as being compensated for services through this system of financial aid, when

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[14] CAPA and the *amicus* Players' Associations both compare the full scholarship award to "fixed salaries based on lock-step salary structures" and point out that professional athletes are "often paid" while injured. (CAPA Br. 19, n.12; Players' Associations Br. 22) But lock step salary structures – typically assigned to specific job classifications or grades – are based upon the market value of the services being performed. And while a professional athlete may still be paid when injured and unable to play, that is because he has negotiated a compensation plan for himself, which even the professional players' associations recognize is an individualized undertaking, quite obviously based on the market value of the athlete's individual abilities. (Players' Associations Br. 11, n.3) By contrast, the student-athletes' aid at Northwestern is tied to the cost of tuition, room, board and books and has absolutely no relationship whatsoever to performance or time spent playing football.

[15] CAPA's citation to Board cases that included employer-provided room and board in backpay calculations and the one case holding that tuition remission benefits provided by a non-university employer constituted compensation are readily distinguishable. (CAPA Br. 21) None of those cases involved the threshold question of employee status nor did any involve the provision of financial aid by an educational institution where the subject individual was enrolled. More importantly, in the cases where the Board *did* consider the employee status of a student enrolled at a university from which the student received financial aid – Leland Stanford University, 214 NLRB 621 (1974), Adelphi University, 195 NLRB 639 (1972), and Brown University – the Board concluded that there was no employment relationship and no attendant compensation for services.

other student-athletes sign an identical Tender. The only fact that distinguishes other scholarship student-athletes from football student-athletes is that football, viewed in isolation from the athletic program in general, generates positive revenue while most other sports do not. As already noted above at Section II.C., that distinction is legally immaterial.

2. Scholarship Football Student-Athletes Are Not Subject To "Employer" Control

Students in an educational setting - including students at Northwestern - are subject to a wide range of institutional controls: from the controls imposed by administrators relating to degree requirements, requisite academic progress and good citizenship in a communal environment, to the controls imposed by faculty in setting course schedules, identifying course content and expectations, and making assignments, to the controls imposed by organizers of extra-curricular activities, such as newspaper story deadlines, orchestra practice, theater rehearsal and football practice. Indeed, control over students' academic, social and personal lives is pervasive in virtually every educational environment. (NU Br. 8-11)

CAPA and several of its *amici* focus on three types of controls as evidence of employee status: (1) controls relating to practice, meeting and game schedules; (2) controls over the "personal lives" of the football student-athletes; and (3) controls related to NCAA compliance. (CAPA Br. 14-18; Labor Law Professors Br. 8-10; AFL-CIO Br. 3-5; Kulwiec Br. 11-12)[16] None of these types of controls are "employer" controls. Rather, they are the type of "controls" that are inherent in extracurricular sports activities at the collegiate level.

Football is a team sport, where the participants must interact with one another in a highly controlled environment to test plays, practice group drills and build rapport. In order to foster such interaction, schedules and itineraries must be put in place and followed, lest the group cease

[16] As a threshold matter, CAPA and these *amici* fail to acknowledge that all three types of "controls" are applicable to the walk-on football players as well as the entire student-athlete community. (NU Br. 8-11, 38-41) Remarkably, one *amicus* who supports CAPA faults Northwestern for the exclusion of walk-ons from the proposed unit, despite the fact that it was CAPA that excluded them from its petition. (Dannin Br. 8-9)

to function as a team. Participants on a football team also compete together, and thus are subject to pre-competition preparation schedules (including travel) and competition schedules. Collegiate athletes in every sport – from cross-country to lacrosse – are subject to practice and competition schedules and itineraries, regardless of whether they receive a scholarship and regardless of whether their particular sport generates any profit for the University. These schedules and itineraries are not akin to employer controls, but are inherent in the nature of organized athletic competition and, indeed, any group endeavor.[17]

One group of *amici* posit that the "control" exercised by Northwestern is "even more apparent" in how the scholarship football student-athletes "must live their lives off the field." (Labor Law Professors Br. 9) In support, they, along with CAPA, focus on the following: the fact that football student-athletes must "friend" their coaches on social media sites; off-campus housing restrictions; vehicle and employment approvals; mandatory drug testing; media appearance restrictions; and name and likeness releases. (Id.; CAPA Br. 14-18; AFL-CIO Br. 3-5) These rules all fall into one of two categories, neither of which indicates an employment relationship: (1) policies aimed at protecting the health and welfare of the student-athlete; and (2) rules imposed by the NCAA. Regarding the former, the social media policy that applies to football student-athletes is entirely consistent with the kind of supervision inherent in the *in loco parentis* setting of an educational institution, and it certainly is not the kind of rule typical or indicative of an employment relationship.[18] Moreover, within the context of a team environment, where coaches are responsible for maintaining cooperation and cohesion and assisting student-

[17] CAPA's reliance on the "lights out" policy during travel for games demonstrates the absurdity of the proposition that the scholarship football athletes are subject to employer control. (CAPA Br. 6) Northwestern is unaware of an industry where employers regulate bed times for their employees. Rather, the "lights out" rule is akin to a paternal rule, and thus not out of place in the educational setting. Notably, dormitory residents at Northwestern are also required to observe "quiet hours" later in the evening. (Jt. Ex. 19 at 28)

[18] Northwestern's athletic department maintains a set of social media guidelines that apply to all student-athletes, regardless of sport and irrespective of whether the student-athletes receive scholarships. In the university setting, these guidelines are no different than the sort of rules and parameters that parents often establish for their teenage and young adult children.

athletes in growing and developing as mature contributors to a larger social community, it is hardly surprising that Coach Fitzgerald considers good behavior in the ever-changing, and very public, world of social media to be a matter of some importance. (Tr. 1023-1024, 1051-1052, 1063-1064; Jt. Ex. 17 at NU 156-164)[19] Regarding the latter, NCAA rules and regulations mandate drug testing of *all* student-athletes – not just scholarship football student-athletes – and further prohibit *all* student-athletes – not just scholarship football student-athletes – from receiving gifts of significant value, which could come in the form of cars, sub-market rental leases and jobs that require little or no actual work.[20] Concluding that application of these NCAA-mandated rules turns scholarship football student-athletes into employees, but does not have the same effect on any other student-athlete subject to the identical rules,[21] is wholly arbitrary and unsupported.

3. The Scholarship Football Student-Athletes Do Not Perform Services

The most glaring flaw in the proposition that scholarship football student-athletes perform "valuable services" akin to work for Northwestern is that the argument flatly ignores the undisputed fact that walk-ons are engaged in the same activities ("services" as CAPA and the Regional Director refer to them). Both sets of student-athletes participate on a team that generates revenue and both devote an extraordinary amount of time and effort to what CAPA mistakenly asserts are football "services," (identified by the union as "practicing, playing in games, attending

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[19] The social media policy also protects student-athletes from publicizing their actions in a way that could be misconstrued as a violation of NCAA rules, which, among other things, prohibits student-athletes from receiving payment for their athletic ability (NU Br. 10-11)

[20] *Amicus* Hausfeld is patently wrong in its suggestion that Northwestern somehow individually controls the NCAA's rules and regulations. (Hausfeld Br. 2-5) As Hausfeld acknowledges, each of the 1,000 member institutions has a single delegate who attends the NCAA Annual Convention, where rule-making for the NCAA and its divisions is accomplished. (Id. at 3, citing NCAA Manual) Clearly, as just one member institution with one vote, Northwestern cannot unilaterally revoke or modify the NCAA's regulations. Similarly, the Labor Law Professors inaccurately assert that the NCAA is organized to represent Northwestern's interests. (Labor Law Professors Br. 13)

[21] The AFL-CIO is incorrect in asserting that the walk-ons are not subject to NCAA restrictions on receiving compensation for the use of their name, image or likeness (AFL-CIO Br. 3); the record shows the opposite to be true. (Jt. Ex. 10 at 21)

meetings, reviewing film, participating in workouts, meeting with media"). (CAPA Br. 12) Under these facts, there is simply no basis for characterizing the scholarship football student-athletes' time commitment as "services." It is pure fiction, based on the most random and indiscernible distinctions, to conclude, on the one hand, that "[p]aid players ... commit themselves to advancing the program's financial goals so completely" (AFL-CIO Br. 3) and on the other, that walk-ons merely participate "for the love of the game." (DDE 17)

Relatedly, CAPA argues that the voluntary activities, which it acknowledges are not supervised by coaching staff and do not require participation at any specific times, are still "services" that the scholarship football student-athletes perform for Northwestern. (CAPA Br. 15-16) CAPA relies on the Regional Director's analogy between these voluntary activities and the "individualized training and practice, often without direct supervision" that performers in the entertainment industry do to enhance their performance. (CAPA Br. 15, citing DDE 17, n.35) This analogy only underscores the faulty premise. Student-athletes who engage in self-directed activities designed to enhance their performance on the field are no different from the student-actors or student-musicians who rehearse lines or practices an instrument on their own time to enhance their performance at a production that generates ticket sales for the University. Neither provides "services" that support a finding of employee status under the common law test.[22]

[22] The Labor Law Professors' attempt to characterize the Northwestern football program as an apprentice program, where student-athletes are trained to become professional athletes, is completely unsupported by the record. (Labor Law Professors Br. 24-26) As two groups of *amici* pointed out, only three percent of student-athletes ever turn professional (ACE Br. 10), and fewer than two percent of Division I football student-athletes are drafted by the NFL. (Baylor Br. 4)

E. THE BOARD MUST CONSIDER THE ECONOMIC AND PUBLIC POLICY RAMIFICATIONS OF IMPOSING COLLECTIVE BARGAINING ON SCHOLARSHIP FOOTBALL STUDENT-ATHLETES

Consistent with Supreme Court precedent[23] and Brown, the Board must consider the purposes of the Act as well as economic and public policy ramifications in determining whether Northwestern's scholarship football student-athletes are employees within the meaning of the Act. Northwestern and many *amici* have demonstrated that a number of economic and policy considerations unique to the educational environment would be ill-served by treating scholarship football student-athletes as employees within the meaning of the Act and imposing a collective bargaining obligation on the school they attend.[24] Although CAPA concedes that "the policies of the Act" are a relevant factor in the Board's determination, it dismisses the economic and public policy arguments advanced by Northwestern and the *amici* simply as variations on the theme that allowing student-athletes to unionize would be "bad for business." (CAPA Br. 38) As shown below, however, the purposes of the Act would be frustrated and there would be numerous adverse economic and policy consequences if Northwestern's scholarship football student-athletes are found to be employees.

1. CAPA Failed To Acknowledge Or Refute That Imposing Collective Bargaining At Northwestern Would Create Chaos In College Athletics

Northwestern explained in its opening brief that imposing a collective bargaining obligation on universities and their scholarship football student-athletes would create a patch-work of labor laws that apply to private and public universities participating in intercollegiate football, profoundly altering college athletics. (NU Br. 25-28) *Amici* further pointed out how the

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[23] See, e.g., Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 168 (1971) ("in doubtful cases resort must still be had to economic and policy considerations to infuse § 2(3) [of the Act] with meaning.").

[24] *Amici* discuss the following relevant policy considerations: intrusion on academic freedom; competitive balance; Title IX consequences; and the taxation of athletic scholarships. (ACE Br. 24-26; APCA Br. 13-17; Baylor Br. 2-5 and 11-13; Leech Tishman Br. 14-19; Senate and House Committees Br. 12-25; Hogan Br. 15-17; National Right to Work Legal Defense & Education Foundation Br. 14-15)

Regional Director's decision, if upheld, would create serious disruptions and undermine equality and fairness among the schools participating in intercollegiate athletics. (Big Ten Br. 3-11; NCAA Br. 20-22) CAPA's only response is that it is neither uncommon nor inherently problematic *within industry* to have collective bargaining result in different outcomes across different employers. (CAPA Br. 38) That response ignores the fact that intercollegiate athletic competitions, *unlike industry*, require that teams compete under uniform terms and conditions. Such a level playing field promotes fairness and is a hallmark of athletic competition, whether in high school, the Olympics, or in college. In fact, that is why the NCAA is organized into different Divisions and why athletic conferences like the Big Ten are formed: to bring schools together for the purpose of fair athletic competition. (NU Br. 27, n.24; Big Ten Br. 3-4) As *amicus* Big Ten explained, the comprehensive regime of NCAA rules is "flatly incompatible with team-by-team collective bargaining" as CAPA seeks in this case. (Big Ten Br. 3)

It should be emphasized that the concern for a level playing field does not arise in professional sports, because professional sports leagues bargain with league-wide associations that represent professional athletes. There is no example of individual team bargaining in all of North American sports. For example, the National Football League Players Association (NFLPA) is the exclusive representative of *all* professional football players and negotiates on a multi-employer basis with *all* 32 professional football clubs. (Players' Associations Br. 3)[25] The NFLPA does not represent a subset of professional players, and the NFLPA does not bargain with a single professional football club.[26] Thus, unlike in professional sports, collective bargaining

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[25] Moreover, the professional sports league model is totally different than collegiate athletics because the *only* relationship between professional players and the league is an economic one. Unlike NFL football players, Northwestern student-athletes balance football with academics. Being enrolled and working toward a college degree is a condition precedent for any student to play on the Northwestern football team.

[26] It is irrelevant that the NFLPA has negotiated with the NFL to permit individual players, and the player's individually retained professional sports agent, to negotiate directly with a single football club on certain terms of the professional player's individual contract. That direct-dealing allowance was created through bargaining by the

would destroy the level playing field among colleges and universities participating in intercollegiate athletics.[27] (NU Br. 26-27)

2. *Granting Collective Bargaining Rights To Male Football Student-Athletes Creates Adverse Consequences Due To Title IX's Equal Opportunity Requirements*

Title IX represents a clear national policy to protect opportunities for all students regardless of gender. However, if Northwestern's scholarship football student-athletes are found to be employees and CAPA is certified as their bargaining representative, CAPA's eventual demands for male football players to receive additional benefits, monetary or otherwise, would undermine Title IX's equal opportunity requirements. (NU Br. 30-31; Baylor Br. 11-13; Senate and House Committees Br. 3-4; Big Ten Br. 21-23; NCAA Br. 8-9) CAPA asserts that Title IX is a "non-issue." But CAPA's assertion is based on its fundamental misconception of the statute and implementing regulations and its misguided view that Title IX compliance is cured by simply spending more money on women's athletics. (CAPA Br. 42-45)

As Northwestern and *amici* have pointed out, Title IX's mandate of equal opportunity requires *program-wide* compliance in a manner that renders unworkable a situation where male football student-athletes have the power to demand economic concessions for a bargaining unit that excludes female student-athletes (and all non-scholarship student-athletes). (Big Ten Br. 21-23, arguing that Title IX's emphasis on equality within the **overall** athletic program for all students at a university impliedly precludes team-by-team bargaining over any particular sport's unique funding, facilities or services) Title IX requires far more than just proportionality in

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NFLPA and the NFL on a *league-wide basis* and begins with the NFLPA-approved template contract for all players. Thus, it does not signify, as *amicus* NFLPA suggests, that individual NFL players negotiate with individual teams in any fashion remotely similar to what CAPA seeks to do to Northwestern.

[27] Like Northwestern, the NCAA also notes the disruption created by the fact that some states prohibit or severely restrict collective bargaining for public employees. (NCAA Br. 20-22) Similarly, the Big Ten details the potential for unfairness of single-school collective bargaining on academic eligibility standards, financial benefits and spirit of fair competition. (Big Ten Br. 5-9)

scholarship funds for male and female student-athletes. Regulations implementing Title IX require schools to analyze a "laundry list" of services, programs, facilities, and benefits offered to male and female student-athletes. (NU Br. 31, n.30; Big Ten Br. 22) These items, such as travel and per diem allowance, locker rooms, practice and competitive facilities, medical and training facilities and services, and housing and dining facilities and services, must be provided on a proportionate basis to all male and female student-athletes. If football student-athletes (all of whom are male) bargain for increased services, programs, facilities or benefits, then other male student-athletes must necessarily receive fewer of those negotiated improvements, or female student-athletes must necessarily receive more of the negotiated improvements, in order to maintain the proportionate balance required by Title IX.[28]

3. Academic Freedom Is A Core Public Policy That Would Be Infringed Upon By Finding That Scholarship Football Student-Athletes Are Employees

CAPA claims that its current stated intention to bargain exclusively over issues of player safety, medical benefits, and "other benefits" should lead the Board to ignore the potential intrusion into academic matters that granting student-athletes employee status would entail. (CAPA Br. 33) CAPA proposes to kick the can down the road, urging the Board to recognize employee status now and define the boundaries of bargaining later. (Id. at 34) CAPA has thus all but admitted that a ruling in its favor will eventually embroil the Board in questions of academic standards, contrary to basic principles of academic freedom and public policy articulated by the Supreme Court.[29] (NU Br. 24-25) CAPA does not dispute that issues like minimum GPA, graduation, course of study, class attendance and other academic requirements are core aspects of

[28] Baylor also explains that Title IX's regulatory scheme may require universities with limited financial resources to cut funding of other male sports *and* increase funding to women's sports. (Baylor Br. 11-13)

[29] Baylor explains that "imposing the Act's mandates" on to the university/student-athlete relationship would raise "difficult and sensitive questions" under the First Amendment. (Baylor Br. 14-15)

a University's academic freedom as articulated by the Supreme Court[30] and the Board.[31] The academic freedom that must be preserved is the University's autonomy to decide how best to educate, and provide for, the students enrolled and entrusted to its care.[32]

When considering the public policy implications of a ruling here, the Board must look beyond CAPA's stated immediate intentions to the questions that student-athlete collective bargaining would inevitably require the Board to consider. By arguing that the Board can sort out any concerns about infringements on academic freedoms should they arise, CAPA essentially concedes the threshold issue that granting student-athletes employee status will embroil the Board deeply in academic concerns. (CAPA Br. 33-34) CAPA envisions that the *Board* will define the line between permissible bargaining issues like "unspecified benefits" and conditions of student-athlete "employment" and impermissible bargaining issues that intrude on academic freedom. But the Board has in the past appropriately kept its distance from drawing those lines. The Board in Brown refused to find employee status in part because it found there to be a "significant risk and indeed strong likelihood" that collective bargaining by graduate students would be detrimental to the educational process. 342 NLRB at 493. Neither CAPA nor any of its supporting *amici* has presented any evidence or convincing argument that this concern is any less with undergraduate scholarship student-athletes.

CAPA also argues that there can be no intrusion on academic freedom because football duties are not part and parcel of the students' academic work at the University. (CAPA Br. 32) In

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30 "*Yeshiva* recognized that collective bargaining should not interfere with the process of setting educational policies." (NCAA Br. 23) As ACE points out, a university has "four essential freedoms: To determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who maybe be admitted to study." (ACE Br. 26)

31 Brown University, 342 NLRB 483, 493 (2004) (noting concerns that collective bargaining would be detrimental to the educational process and academic freedom and declining to "take these risks with our nation's excellent private educational system.").

32 Thus, the analogy offered by AAUP is inapposite because it concerns faculty members seeking to retain the individual academic freedom to teach or research certain views or topics in the classroom, not students who seek to collectively bargain over the academic experience provided by the University and its faculty members.

reality, however, it is impossible to separate athletics participation from the educational experience. And even if such separation were possible, collective bargaining, if allowed, will extend far beyond the football field and will intrude upon on the core academic mission of the University.[33]

4. CAPA Cannot Refute The Risk That The Regional Director's Ruling Will Lead To Taxation Of Athletic Scholarships

Congress has recognized that athletic scholarships are not subject to federal income taxes because the student-athlete is not receiving payment for services required as a condition of receiving the grant. (NU Br. 29-30; ACE Br. 22-23; Big Ten Br. 20-21; NCAA Br. 9; Notre Dame Br. 20-24; Senate and House Committees Br. 6-7) A Board ruling that student-athletes "render services" to their schools as employees in exchange for athletic scholarships would destroy that rationale and could well result in athletic scholarships being treated as taxable income. CAPA argues that the IRS and the Board interpret different statutes and a Board ruling that student-athletes are employees who render services in return for payment "should have no effect on the tax treatment of football scholarships." (CAPA Br. 42) While it is true that the Internal Revenue Code and the Act are different statutes, the language of the Internal Revenue Code is clear: if a scholarship is "payment for ... services by the student required as a condition for receiving the qualified scholarship," then it is taxable. 26 U.S.C. § 117(c). A contrary ruling

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[33] Constraints on bargaining resulting from the extensive NCAA regulation of many aspects of the relationship between Northwestern and its football student-athletes is also a highly relevant consideration in deciding whether, in combination with other policy considerations, the football scholarship recipients are employees within the meaning of the Act. Notwithstanding the Board's decision in Management Training Corp., 317 NLRB 1355 (1995), the fact remains that Northwestern does not have the ability to negotiate over most mandatory subjects of bargaining without being penalized by the NCAA, and CAPA's assurance that it will not seek bargaining over matters covered by NCAA regulations at this time is irrelevant and unenforceable. When coupled with the concern that CAPA's bargaining demands inevitably would intrude upon matters of academic freedom, the paucity of subjects over which the parties would be free to bargain, and the potential "Catch 22" that Northwestern would face if presented with demands that intrude into either of these areas of concern should give the Board pause in deciding whether to give Northwestern's football scholarship recipients the right to engage in collective bargaining, even if they are found to be employees within the meaning of the Act. In this respect, the analogy to the Board's treatment of confidential employees is fitting and appropriate. (NU Br. 48)

by the Board would obviously throw into doubt the taxability of athletic scholarships, which, as Northwestern pointed out in its opening brief, would result in a substantial detrimental impact on students who receive such scholarships. (NU Br. 30, n.29)

F. IN THE ALTERNATIVE THE BOARD SHOULD DECLINE TO ASSERT JURISDICTION OVER INTERCOLLEGIATE ATHLETIC PROGRAMS

Under Section 14(c)(1) of the Act, the Board may, "in its discretion ...decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." 29 U.S.C. § 164(c)(1). Based on this statutory authorization, the Board, for example, has declined to exercise jurisdiction over the horse and dog racing industries notwithstanding the fact that both industries generate millions of dollars in revenue. See 29 C.F.R. § 103.3. (NU Br. 23-24) As explained in Chicago Mathematics & Science Academy Charter School, Inc., the Board's rationale for declining to assert jurisdiction over these industries was premised on the pattern of short-term employment which minimized the industries' impact on commerce and posed obstacles to the potential effectiveness of the Board's oversight. 359 NLRB No. 41, slip op. at 17 (2012).

Here too, there is a pattern of short-term participation in intercollegiate athletics, a relatively small number of private universities are potentially impacted by the Board's holding in this case, the potential impact on interstate commerce is minimal, and there are significant public policy reasons why the Board should not allow football scholarship student-athletes to engage in collective bargaining under the Act. Accordingly, even if the student-athletes are found to be employees within the meaning of the Act, the Board should decline to assert jurisdiction over private intercollegiate athletic programs.

G. OTHER LAWS ARE RELEVANT TO THE ISSUE OF EMPLOYEE STATUS

It is not surprising that CAPA takes the position that no other federal or state statute is relevant to the employee status of student-athletes, given that *all* such authorities roundly reject the proposition that student-athletes are employees. (NCAA Br. 6-10; Notre Dame Br. 8-10; Big Ten Br. 15-21; ELA Br. 10; ACE Br.19-24; Baylor Br. 9-14) According to CAPA, "[i]n reality, Title IX is a non-issue" both on the topic of employee status under the Act and as a matter of policy affecting whether the scholarship football student-athletes should be permitted to collectively bargain under the Act.[34] (CAPA Br. 43) But CAPA ignores the fact that Congress has made clear its view that intercollegiate athletics is part of an educational program. In its *amicus* brief, ACE carefully detailed the congressional history regarding the passage of Title IX, the issuance of its implementing regulations and the passage of the Civil Rights Restoration Act of 1987 (the CRRA). (ACE Br. 19-24) ACE noted first that Congress rejected legislative efforts to exclude "revenue producing" intercollegiate athletic activities from Title IX coverage and, second, that Congress then passed additional legislation, the CRRA, to provide explicitly that Title IX applies to all athletic programs, even though the programs themselves were not direct recipients of federal assistance. (Id. at 20-21) Contrary to CAPA's argument, if in fact student-athletes were employees under Title VII, which has a definition of "employee" similar to the Act, there would be no need for Congress to insist on the application of Title IX to intercollegiate athletics, and especially "revenue-producing" intercollegiate athletics, because they would already have Title VII protections against discrimination.

Despite the similarity between the definition of employee under Title VII and the Act, neither CAPA nor any *amici* supporting CAPA's position - save for one, *amicus* Kulwiec - assert

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[34] Northwestern addresses, *supra* at 19-20, the policy concerns under Title IX implicated by a finding of employee status.

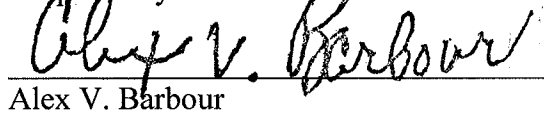
that Title VII has any relevance to the ultimate issue. Presumably that is because Title VII jurisprudence is aligned with the Board's 25-year precedent in the educational context, culminating with Brown. (NU Br. 43-46) There is not a single decision under Title VII where a court has concluded that a student-athlete who receives an athletic scholarship is an employee for Title VII purposes. See Kemether v. Pennsylvania Intercollegiate Athletic Ass'n, Inc., 15 F. Supp. 2d 740, 759 n.11 (E.D. Pa. 1998) ("No federal court has defied common sense by holding student athletes to be Title VII employees of their schools or an athletic association."). Given the similarity in the definition of employee under both statutes, the Board should afford weight to this authority. In a variety of other contexts, courts have consistently held that athletic scholarships are *not* compensation and student-athletes are *not* employees. (NU Br. 41-43; NCAA Br. 6-9; Notre Dame Br. 21-23; Big Ten Br. 14-21; ELA Br. 10-12; ACE Br.12-15; Baylor Br. 9-11)

III. CONCLUSION

For the reasons set forth above, Northwestern respectfully requests that the Regional Director's Decision be reversed, that the Board find that Northwestern's football scholarship student-athletes are not employees within the meaning of the Act, and that the petition in this case therefore should be dismissed.

Dated: July 31, 2014

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Alex V. Barbour, an attorney, state under oath that I caused a copy of the foregoing **Northwestern University's Reply Brief To The Board On Review Of Regional Director's Decision And Direction Of Election** to be electronically filed with the National Labor Relations Board and electronically served upon the following on this 31st day of July, 2014.

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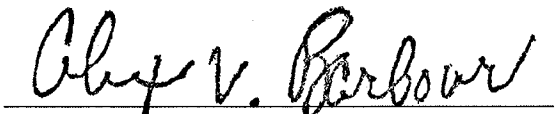

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